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September 20, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: June 21, 2004

Case No.: TIA-0116

XXXXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy for assistance in filing for state workers' compensation benefits based on the employment of her late husband, XXXXXXXXXXX (the worker). The DOE Office of Worker Advocacy determined that the applicant was not a DOE contractor employee under the regulations at issue here and, therefore, was not eligible for DOE assistance. The applicant appeals that determination. As explained below, we have concluded that the determination is correct.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act creates two programs for workers.

The Department of Labor (DOL) administers the first EEOICPA program, which provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 73841(1). The DOL program also provides federal monetary and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 7384u.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, the DOE program provides for an independent physician panel assessment of whether a "Department of Energy contractor employee" has an illness related to exposure to a toxic substance at a DOE facility. 42 U.S.C. § 7385o. In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3).

The DOE program is specifically limited to DOE contractor employees¹ who worked at DOE facilities.² The reason is that the DOE would not be involved in state workers' compensation proceedings involving other employers.

The regulations for the DOE program are referred to as the Physician Panel Rule and are set forth at 10 C.F.R. Part 852. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program.³

Pursuant to an Executive Order,⁴ the DOE has published a list of facilities covered by the DOL and DOE programs, and the DOE has designated next to each facility whether it falls within the EEOICPA's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 69 Fed. Reg. 51,825 (August 23, 2004) (current list of facilities). The DOE's published list also refers readers to the DOE Worker Advocacy Office web site for additional information about the facilities. 69 Fed. Reg. 51,825.

II. The Appeal

This case involves the program administered by the DOE that provides access for eligible DOE contractor employees or their survivors to a Physicians Panel Process. The Physicians Panel established under the EEOICPA determines the validity of claims that a current or former DOE contractor employee's illness or death arose from his or her exposure to a toxic substance during the course of his or her employment at a DOE facility.

In the case at hand, the DOE Worker Advocacy Office declined to present the applicant's application to a Physicians Panel because the office determined that the applicant's late husband did not meet the eligibility requirements for the Physicians Panel Process. *See* May 11, 2004 letter from DOE Worker Advocacy Office to the applicant.

¹ A DOE contractor is defined as follows: (a) an individual who is or was in residence at a DOE facility as a researcher for one or more periods aggregating at least 24 months; (b) an individual who is or was employed at a DOE facility by (i) an entity that contracted with DOE to provide management and operation, management and integration, or environmental remediation at the facility; or (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility. 10 C.F.R. § 852.2.

² A DOE facility is defined as: any building, structure or premise, including the grounds upon which such building, structure, or premise is located: (a) in which operations are, or have been, conducted by, or on behalf of the DOE (except for buildings, structures, premises, grounds, or operations covered by Executive Order No. 12344 dated February 1, 1982 (42 U.S.C. § 7158 note), pertaining to Naval Nuclear Propulsion Program); and (b) with regard to which DOE has or had (i) a propriety interest; or (ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services. 10 C.F.R. § 852.2.

³ *See* www.eh.doe.gov/advocacy.

⁴ *See* Executive Order No. 13,179 (December 7, 2000).

In her appeal, the applicant states that her late husband worked his entire life for one employer, Aliquippa Forge-Universal Cyclops, Inc. in Aliquippa, Pennsylvania (hereinafter referred to as “Aliquippa-Forge”). According to the applicant, her late husband’s employment spanned 35 years at Aliquippa-Forge, from 1944 to 1979. She claims further that her late husband became ill from exposure to radioactive material and silica metal dust while working at his place of employment. The applicant argues on appeal that the decision by the DOE Worker Advocacy Office is unfair because her husband was already stricken with illness by the time the DOE took over the facility in question. She contends further that her husband never received any compensation for his illness and that someone should be held responsible for his illness.

III. Analysis

A. Worker Programs

As an initial matter, we emphasize that the DOE physician panel process is separate from state workers’ compensation proceedings. A DOE decision that an applicant is not eligible for the DOE physician panel process does not affect (i) an applicant’s right to file for state workers’ compensation benefits or (ii) whether the applicant is eligible for those benefits under applicable state law.

Similarly, we emphasize that the DOE physician panel process is separate from any claims made under other statutory provisions. Thus, a DOE decision concerning the physician panel process does not affect any claims made under other statutory provisions, such as programs administered by DOL and DOJ.

We now turn to whether the applicant in this case is eligible for the DOE Physician Panel process.

B. Whether the Applicant is Eligible for the DOE Physician Panel Process

As noted above, access to the DOE Physician Panel is limited to applications filed by or on behalf of a DOE contractor employee who is or was employed at a DOE facility. See 10 C.F.R. § 852.1(b). Under the EEOICPA, a worker who was employed by an Atomic Weapons Employer or a Beryllium Vendor is not eligible to use the DOE Physician Panel.

To determine whether the worker in question was a DOE contractor who worked at a DOE facility, we consulted the DOE’s published facilities list set forth at 69 Fed. Reg. 51,825. On that list, Aliquippa-Forge (also known as Vulcan Crucible Steel Co. and Universal Cyclops, Inc.) is listed as “AWE” and “DOE,” the codes for “atomic weapons employer facility”⁵ and “DOE facility.” We next reviewed the Office of Worker Advocacy web site. There, we learned that Aliquippa-Forge was a DOE facility for only

⁵ An “Atomic Weapons Facility” is defined as a facility, owned by an atomic weapons employer, that is or was used to process or produce, for use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining and milling. EEOICPA, § 30.5(e).

one year, 1988, when Bechtel National Inc. (Bechtel) provided environmental remediation work under an umbrella contract with the DOE. See 69 Fed. Reg. 51,825 (entry for Aliquippa-Forge); www.eh.doe.gov/advocacy (Aliquippa Forge entry in searchable database on sites). We also reviewed a Final Report issued by the Oak Ridge Institute for Science and Education in December 1992 on the Aliquippa-Forge facility to learn more about the facility. According to the Final Report, Bechtel, a DOE contractor, performed a limited radiological survey of the Aliquippa-Forge site in December 1987. The Final Report states that Bechtel conducted interim remedial activities on the site in 1988. The report does not state when Bechtel completed remediation activities on the site. Nevertheless, the issue of when Bechtel completed its remediation of the Aliquippa-Forge site is not relevant here because Bechtel became a DOE contractor after the applicant's late husband left the employ of Aliquippa- Forge in 1979.

Based on the available evidence, we conclude that the applicant's late husband was not a DOE contractor who worked at a DOE facility. Her late husband worked for Aliquippa-Forge from 1944 to 1979. Aliquippa-Forge did not become a DOE facility until nine years after the applicant's late husband left Aliquippa-Forge's employ.

The Office of Worker Advocacy website also indicates that Aliquippa-Forge was an "Atomic Weapons Employer" from 1947 to 1950 when the Atomic Energy Commission operated a rolling mill, two furnaces and cutting and extrusion equipment at the facility. However, since workers employed by Atomic Weapons Employers cannot use the DOE Physician Panel process, the DOE cannot accept applicant's claim for processing. We reiterate that our decision regarding the applicant's ineligibility in this case does not affect her eligibility for (i) state workers' compensation benefits or (ii) federal monetary and medical benefits under other statutory provisions, including EEOIPCA claims at the Department of Labor.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0116 be, and hereby is, denied.
- (2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 20, 2004

